No. 90-1912

In The

Supreme Court of the United States

October Term, 1990

STEPHANIE NORDLINGER, an individual,

Petitioner,

v.

KENNETH HAHN, in his capacity as Tax Assessor for the County of Los Angeles and the COUNTY OF LOS ANGELES,

Respondents.

On Writ Of Certiorari To The Court Of Appeal Of California

AMICUS CURIAE BRIEF OF HOWARD JARVIS TAXPAYERS FOUNDATION AND 31 ELECTED CALIFORNIA OFFICIALS IN SUPPORT OF RESPONDENTS KENNETH HAHN, ASSESSOR FOR THE COUNTY OF LOS ANGELES AND THE COUNTY OF LOS ANGELES

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IDENTITY AND INTERESTS OF AMICI

Pursuant to Supreme Court Rule 37, Howard Jarvis Taxpayers Foundation (HJTF) and 31 elected California officials submit this brief amicus curiae in support of respondents Kenneth Hahn and the County of Los Angeles. Although there have been a number of other amicus briefs filed in this case in support of respondents, the purpose of this brief is quite narrow. This brief will address solely the issue of retroactivity in the event this Court invalidates Article XIIIA of the California Constitution.

Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

The Howard Jarvis Taxpayers Foundation (HJTF) is a nonprofit, tax-exempt California corporation. It is a research and educational organization affiliated with, but separate from, the Howard Jarvis Taxpayers Association which has filed a separate brief on the merits in this case. HJTF recently commissioned four separate studies to provide alternatives that would protect taxpayers if Article XIIIA were overturned by this Court. Those studies were conducted by Dr. Art Laffer, Professor Craig Stubblebine of Claremont-McKenna College, Professor Gary Galles of Pepperdine University, and Professor Alvin Rabuska of the Hoover Institute. While each study identified an alternative to Article XIIIA, each study concluded that Article XIIIA in its current operation is the preferred system of property taxation for the State of California.

Assemblyman Jim Brulte; Assemblyman Chris Chandler; Assemblyman Ross Johnson; Assemblyman

Mickey Conroy; California State Board of Equalization Vice Chairman Ernest J. Dronenburg; Assemblyman Tom Mays; Assemblyman Richard Mountjoy; Senator Edward Royce; Assemblywoman Paula Boland; Senator Marian Bergeson; Senator John Lewis; Assemblyman Bill Lancaster; Senator Cecil Green; California State Board of Equalization Member Matthew Fong; Senator Robert Beverly; Senator Lucy Killea; San Mateo County Assessor Roland Giannini; Assemblyman Bill Filante; Senator Bill Leonard; Assemblywoman Andrea Seastrand; Senator Daniel Boatwright; Senator Bill Lockyer; Senator Ruben Ayala; Senator Frank Hill; Assemblyman Paul Horcher; Senator Quentin Kopp; Assemblywoman Jackie Speier; Assemblyman Tom McClintock; Assemblyman Phillip Wyman; Assemblywoman Doris Allen; and United States Senator John Seymour are officials elected to office in the State of California. Amici elected officials consist of republicans, democrats and an independent.

OPINION BELOW

The opinion of the California Court of Appeal is reported at 225 Cal. App. 3d 1259 (1990).

STATEMENT OF THE CASE

Petitioner filed this action in the Los Angeles County Superior Court on September 18, 1989, against the County of Los Angeles and the county assessor. The trial court sustained respondents' demurrer without leave to amend and judgment was entered against Petitioner. The

judgment was upheld by the California Court of Appeal for the Second Appellate District in a published decision. Petitioner's Petition for Review to the California Supreme Court was denied on February 28, 1991.

STATEMENT OF FACTS

Petitioner is a resident of the City of Los Angeles who purchased her home in 1988 for $170,000. Upon purchase, her house was reassessed to current market value as required by Article XIIIA of the California Constitution. Under the terms of Article XIIIA, Petitioner will pay annually a maximum property tax of 1% of value.[1] In addition, future increases in the taxable value of Petitioner's property will be limited to 2% annually. There is no dispute that Petitioner's tax liability is based on the price she voluntarily paid for her home or that she was fully aware of the tax consequences of her purchase.

The precise relief sought by Petitioner is unclear, even to Petitioner. On one hand, Petitioner appears to seek a refund of taxes in an amount equal to that which she would be entitled if there were no reassessment at all upon change of ownership. In other words, under the theory of her case as reflected by the complaint, she appears to seek a rollback of her assessed value to the Article XIIIA base year reflected by the 1975-76 assessment rolls. In her brief on the merits, however, Petitioner seems to seek some sort of reassessment of all California

[1] The 1% may be exceeded only for voter approved indebtedness. *Cal. Const.*, art. XIIIA, § 1(b).

properties with a reduction in tax rate to achieve "revenue neutrality." Petitioner's Brief on the Merits at 49-50.

SUMMARY OF ARGUMENT

It is Amici's primary position that Article XIIIA fully comports with the Equal Protection Clause of the United States Constitution and that the issues presented in this brief need not even be addressed. If, however, Amici are incorrect and a majority of this Court concludes that California is not free to adopt an acquisition value based system of property taxation, then Amici believe that this Court should specify that its ruling be applied prospectively only. If this Court does not so specify the prospective application of a ruling striking Article XIIIA of the California Constitution, it should, at a minimum, leave the issue of remedy to the courts and legislative body of the State of California.

ARGUMENT

A ruling by this Court that Article XIIIA somehow violates the Equal Protection Clause of the United States Constitution would, of course, be disastrous in its own right. *Infra* at 11-12. The ill effects of such a ruling, however, would be immeasurably compounded if it were to be applied retroactively. Should this Court's ruling strike down California's deliberately chosen method of property taxation, existing decisional law from this Court provides an ample basis for applying such a ruling prospectively only. If this Court disagrees and finds that it

cannot specify that a negative ruling be applied prospectively, then it should leave the issue of remedy to the State of California.

I

IF THIS COURT INVALIDATES ARTICLE XIIIA OF THE CALIFORNIA CONSTITUTION, IT SHOULD SPECIFY THAT ITS RULING IS NOT TO BE APPLIED RETROACTIVELY

The issue of whether decisions invalidating state taxes as violative of the federal constitution should be applied retroactively continues to be troublesome and complex for both the courts and practitioners.[2] However, as applied to the potentiality that Article XIIIA of the California Constitution violates the Equal Protection Clause, the case law suggests that such a ruling may be applied prospectively only.

This Court has recently issued three major rulings relating to retroactivity of tax decisions. In *McKesson v. Div. of Alcoholic Beverages & Tobacco*, ___ U.S. ___, 110 S. Ct. 2238 (1990) a distributor of alcoholic beverages brought an action against Florida officials challenging the state's tax rate preferences for products using crops commonly grown in Florida. The Florida trial court, relying on this Court's decision in *Bacchus Imports, Ltd v. Dias*,

[2] *See, e.g.*, Hellerstein, *Supreme Court Settles Some State Tax Issues While Creating Other Problems*, Journal of Taxation, September 1991, at 180; Tatarowicz, *Right to Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 Tax Lawyer 102 (Fall 1987).

468 U.S. 263, 104 S. Ct. 3049 agreed with McKesson and enjoined future enforcement of the preferential tax rate reductions. However, the trial court, as well as the Florida Supreme Court in its affirmance, refused to grant retroactive relief.

In finding that prospective relief was inadequate to protect McKesson's constitutional rights, this Court concluded that

> "if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *Id.* at 2242.

Because McKesson was required to pay the tax in order to mount a legal challenge, injunctive relief was deemed inadequate.

Other retroactivity issues were addressed in a ruling decided contemporaneously with *McKesson*. In *American Trucking Association, Inc. v. Smith*, ___ U.S. ___, 110 S. Ct. 2323 (1990) this Court was highly divided over the issue of whether a taxpayer was entitled to retrospective relief prior to the date of an earlier decision that overturned precedent in establishing the taxpayer's Commerce Clause claims. In *American Trucking*, out-of-state trucking interests sued Arkansas officials over the state's highway excise tax. The tax, computed in a manner which imposed greater per-mile costs on out-of-state truckers, was upheld by Arkansas state courts. However, the decision

of the Arkansas Courts was remanded in light of this Court's decision in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 107 S. Ct. 2829 (1987) which held that unapportioned flat highway use taxes penalize travel within a free trade area among the States in violation of the Commerce Clause. In the subsequent case, this Court had to determine whether its previous decision in *Scheiner* applied retroactively to taxation of highway use prior to the date of that decision. A plurality of this Court said no.

This Court first noted that "[t]he determination whether a constitutional decision of this Court is retroactive – that is, whether the decision applies to conduct or events that occurred before the date of the decision – is a matter of federal law." *American Trucking*, 110 S. Ct. at 2330. Moreover, whether retroactivity is required in federal cases depends on application of the standard announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349 (1971). *Id.* at 2331.

Chevron Oil governs retroactivity issues and is comprised of a three part test.

> 1. "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed."
>
> 2. "Second, [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
>
> 3. "Finally, [the court must weigh] the inequity imposed by retroactive application, for where a

> decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in [United States Supreme Court] cases for avoiding the injustice or hardship by a holding of nonretroactivity." 404 U.S. at 106-107, 92 S. Ct. at 355.

In applying *Chevron Oil* to the facts in *American Trucking*, this Court concluded that *Scheiner's* invalidation of flat rate highway excise taxes would not apply to the taxation of highway use before that case was decided.

Finally, in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439 (1991) this Court was confronted with another case involving tax preferences for alcoholic beverages which consist of products produced within the taxing jurisdiction. Again, this Court was highly divided (as evidenced by five separate opinions issued in the case) over how the retroactivity issue should be resolved. Justice Souter, announcing the judgment of the court and with Justice Stevens concurring, stated that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." 111 S. Ct. at 2446. Although the other opinions filed in *Beam* took exception to some or all of Justice Souter's analysis, it can be stated safely that a majority of this Court would apply the principles of *Chevron Oil* to retroactivity issues. (*See, e.g.*, 111 S. Ct. at 2451, dissent of Justice O'Conner with whom the Chief Justice and Associate Justice Kennedy concurred).

If this Court concludes that the reassessment upon change of ownership provision of Article XIIIA is unconstitutional it should, under the principles of *Chevron Oil*, make its ruling prospective only. Under the first part of

the *Chevron Oil* test, a decision to be applied nonretroactively must establish a new principle of law. That prong of *Chevron Oil* would be met clearly if this Court were to invalidate Article XIIIA. Under a long line of cases, this Court has repeatedly stated that states are afforded great latitude in devising systems of taxation. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). *See, e.g. Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 88 (1940) ("in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (footnote omitted)); and *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959) ("the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interest").

This Court's ruling in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 109 S. Ct. 633 (1989) would not change the radically novel nature of a ruling striking down Article XIIIA. Indeed, this Court expressly stated in *Allegheny Pittsburgh* that it was *not* addressing a situation where the reassessment upon change of ownership provision was "the law of a state generally applied."

The first prong of the *Chevron Oil* test also involves the question of whether the ruling "decid[es] an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at ___. In this case, there has been no basis to anticipate that Article XIIIA is unconstitutional. In addition to the authority cited above, *no court has ever held that an acquisition value based system of property taxation deliberately chosen by a state* is unconstitutional. Indeed, this issue was litigated in California more than a decade ago. *Amador Valley Joint Union High School District v. State*

Board of Equalization, 22 Cal. 3d 208 (1978). Moreover, *none* of the state court decisions in the wake of *Allegheny Pittsburgh* found a constitutional violation.

The second prong of *Chevron Oil* is the balancing of "the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. 404 U.S. at 106-107.[3] The prior history of the "rule" inva' dating acquisition value based property tax systems, to the extent it exists at all, is found solely in this Court's decision in *Allegheny Pittsburgh*. Its purpose, under petitioner's theory, is to achieve a particular sort of tax equity."[4] Retroactive application of the new rule of law in this case would serve no useful purpose. Assuming this Court did find Article XIIIA to violate the Equal Protection Clause, the purpose of the rule would be adequately advanced by prospective relief only.

The final *Chevron Oil* factor is a consideration of the equities involved. As this Court stated, "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." *American Trucking*, 110 S. Ct. at 2332

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[3] The viability of *Chevron Oil's* second prong is questionable in light of *James B. Beam*. In that case, at least a plurality of this Court indicated outright rejection of selective or "modified" prospectivity.

[4] Of course, it is amici's contention that acquisition value based taxation is more equitable than traditional current market value systems.

citing *Chevron Oil*. Because "the invalidation of the State's HUE tax would have potentially disruptive consequences for the State and its citizens," this Court ruled in *American Trucking* that the decision should not be applied retroactively.

While the potential disruptive effects to Arkansas and its citizens were significant in *American Trucking*, they pale in comparison to what would happen in California if a negative Article XIIIA ruling were applied retroactively. The California Assessors' Association (CAA) has already filed a brief in this case outlining the disastrous impacts on the State of California if Article XIIIA is declared unconstitutional. Brief of Amicus Curiae California Assessors' Association In Support of Neither Party at 4. Among just a few of the potential impacts would be an immediate *tax increase of $11-13 Billion*. Moreover, according to the assessors, if "escape assessments" are required because of this Court's ruling, this could require "as much as 30 Billion dollars in back tax liability, with attendant public turmoil, outrage, and serious hardship to people who could not afford, or are unable to pay, unanticipated major tax increases." *Id.*

In addition to the potential for a huge tax increase and collection of billions of dollars in back taxes, implementing a retroactive decision would be administratively staggering. According to the assessors, there would be only 1,736 property appraisers to reassess over 9.7 million parcels of real property in the State of California. *Id.* at 5. "[T]his too would entail substantial administrative costs and could at some point run into independent constitutional restrictions." *American Trucking* at 2333.

Amici herein will not repeat the points contained in the cogent brief filed by the California Assessors' Association. Amici herein wish only to endorse the points contained in that brief and suggest to this Court that CAA provides a realistic, albeit frightening, scenario of the potential impacts of this case. Moreover, the County Assessors' Brief should be viewed as highly authoritative. First, it is the membership of that organization which will be burdened with the implementation of *any* decision of this Court (whether retroactive or not) invalidating Article XIIIA. In short, CAA's expertise on this issue cannot be ignored. Second, although CAA has a substantial stake in the outcome of the case, it has endorsed neither side with respect to the underlying merits. In this regard, CAA can be considered a neutral participant.

It is amici's principle position that, on the merits, this Court should rule for respondents. However, if a majority of this Court is inclined to find that Article XIIIA of the California Constitution violates the Equal Protection Clause, then this Court should specify that its ruling is to be given prospective application only.

II

IF THIS COURT INVALIDATES ARTICLE XIIIA OF THE CALIFORNIA CONSTITUTION AND DOES NOT SPECIFY THAT ITS RULING IS TO BE APPLIED PROSPECTIVELY ONLY IT SHOULD, AT A MINIMUM, LEAVE THE ISSUE OF REMEDY TO THE STATE OF CALIFORNIA

It is certainly within the power of this Court, under the principles of *Chevron Oil*, to rule that any decision invalidating Article XIIIA of the California Constitution

would be applied prospectively only. However, this Court has also noted that the issue of remedy in the invalidation of state taxes on federal constitutional grounds may also appropriately be left to the states. "When we have held state taxes unconstitutional in the past it has been our practice to abstain from deciding the remedial effects of such a holding. While the relief provided by the State must be in accord with federal constitutional requirements, [citation omitted] we have entrusted state courts with the initial duty of determining appropriate relief. Our reasons for doing so have arisen from a perception based in consideration of federal-state comity." *American Trucking*, 110 S. Ct. at 2330.

If this Court decides not to resolve the retroactivity issue it should, at a minimum, leave the issue of remedy to the State of California.

CONCLUSION

There is little dispute that a ruling from this Court upsetting the carefully balanced and deliberately chosen method of taxing property in the State of California would result in fiscal chaos. That chaos and hardship, however, would be greatly intensified if such a ruling were applied retroactively. For the reasons stated above, if a majority of this Court concludes that California is not free to adopt an acquisition value based system of property taxation, then amici believe that this Court should specify that its ruling be applied prospectively only. If this Court does not so specify the prospective application

of a ruling striking Article XIIIA of the California Constitution, it should not specify retroactivity, but rather leave the issue of remedy to the courts and legislative body of the State of California.

DATED: January, 1992

Respectfully submitted,

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